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*Counsel for Pocatello Dental Group, P.C.*

**UNITED STATES DISTRICT COURT  
DISTRICT OF IDAHO**

POCATELLO DENTAL GROUP, P.C., )  
an Idaho professional corporation, )  
 )  
Plaintiff, )

Case No. CIV 03-450-E-LMB

vs. )

**PLAINTIFF'S RESPONSE TO  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT FILED ON  
FEBRUARY 26, 2004**

INTERDENT SERVICE CORPORATION, )  
a Washington corporation, )  
 )  
Defendant. )

INTERDENT SERVICE CORPORATION, )  
a Washington corporation, )  
 )  
Counterclaimant, )

vs. )

POCATELLO DENTAL GROUP, P.C., an )  
Idaho professional corporation; DWIGHT G. )  
ROMRIELL, individually; LARRY R. )  
MISNER, JR., individually; PORTER )  
SUTTON, individually; ERNEST SUTTON, )  
individually; GREGORY ROMRIELL, )  
individually; ERROL ORMOND, individually;) )  
and ARNOLD GOODLIFFE, individually, )  
 )  
Counterdefendants. )

COMES NOW Plaintiff, Pocatello Dental Group, P.C. ("PDG"), through counsel, and submits this response to the Motion for Summary Judgment filed by Defendant, InterDent Service Corporation ("ISC"), on February 26, 2004.

### **I. Introduction**

ISC accuses the Group of forum shopping. While it is true that actions between the Group and ISC have been pending in three courts, ISC chose two of those three courts. ISC filed its bankruptcy case in Santa Ana, California. The Group filed its action in state court in Bannock County. ISC removed that action to federal court. To the extent there has been any forum shopping, ISC is the guilty party.

The Group is not seeking to recover any damages from ISC for breaches of the Management Agreement which occurred prior to the confirmation of ISC's plan of reorganization in its bankruptcy. There have been numerous breaches of the Management Agreement after confirmation of the plan which form the basis of the Group's claims in this lawsuit. ISC's bankruptcy does not protect it from claims for post-confirmation breaches.

### **II. ISC's Statement of Undisputed Facts**

Although Local Rule 7.1(b)(1) requires a party moving for summary judgment to file a separate statement of material, undisputed facts, ISC included its statement in its Memorandum of Points of Authorities. Most of the "facts" included in the statement are immaterial, irrelevant or misleading.

### **A. The Management Agreement**

Despite having no relevance to ISC's motion, which seeks a dismissal of the Group's claims rather than a judgment on ISC's counterclaims, ISC likes to mention that its predecessor, GMS Dental Group Management, Inc. ("GMS") paid \$2.8 million in cash and stock for the nonprofessional assets of the Group and that Drs. Misner and Dwight Romriell, the only two dentists to take a cash only payment, each received \$400,000. ISC fails to mention that GMS received all of the dental equipment owned by the Group and more than \$2 million in accounts receivable at the time of the purchase, and paid the other five dentists \$980,000 in stock which is now worthless because of the poor management practices of ISC. GMS paid the Group's members only \$1.82 million in cash. In just two years, 2001 and 2002, ISC received nearly that amount (\$1.72 million) in earnings before interest, tax, depreciation and amortization (EBITDA).<sup>1</sup> Furthermore, ISC has never disclosed what it paid GMS for the assets related to the Group and has never documented that it acquired GMS's rights to the Management Agreement.

The report of Larry Wintersteen also has no relevance to ISC's motion. It has nothing to do with whether the claims related to Dr. Dwight Romriell are moot or whether bankruptcy law precludes PDG's other claims. ISC includes it in the statement simply to attempt to disparage the Group. If the report is considered at all, it should be taken as a whole. ISC quotes from two of 113 recommendations. The paragraph from which ISC's first quote is taken includes the sentence, "Hopefully, **both** sides will not bite the hand that feeds them." Wintersteen Report, pp. 8-9, ¶ 55.<sup>2</sup>

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<sup>1</sup> See, Affidavit of Ron Kerl, submitted herewith, at ¶ 2.

<sup>2</sup> The Wintersteen Report is attached as Exhibit B to the Affidavit of Ivar Chhina in Opposition to Plaintiff's Motion for a Preliminary Injunction (Docket No. 15). Mr. Chhina's

The beginning of the paragraph from which ISC's second quote is taken reads "As I have read thru your contract with Interdent . . . it appears that they [ISC] have not been concerned with maintaining a state of the art facility (physically, emotionally, financially or mentally). I would suggest they [ISC] re-read and carefully define if they can honor the standards that are in writing." Wintersteen Report, p. 12, ¶ 105. The report is not as one-sided as ISC would like the Court to believe.

Professional and courtesy discounts also have nothing to do with ISC's motion. However, the Management Agreement specifically gives the Group the exclusive right to make such discounts. Management Agreement, ¶ 4.6(b). When ISC unilaterally decided to charge such discounts against the dentists' compensation, it breached the Management Agreement. The Group has responded by giving notice to ISC that its conduct breached the Management Agreement and, in addition to numerous other breaches, provided a basis to terminate the Management Agreement.

ISC alleges that the dental practice was unprofitable on an accrual basis in September 2003. Again, this has no relevance to ISC's motion. If the dental practice was unprofitable that month, it was likely due to ISC's conduct which led to the resignation of Dr. Porter Sutton from the Group. His resignation was effective in August 2003. September was the first month that he was not generating accounts receivable.

#### **B. The Bankruptcy Action**

The Group takes exception to two statements made by ISC concerning the bankruptcy action. First, the Group and ISC were never involved in an "adversary proceeding" in ISC's bankruptcy

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affidavit is also included in Exhibit 1 to the Affidavit of Scott Kaplan (Docket No. 65).

case, as that term is defined in Rule 7001 of the Federal Rules of Bankruptcy Procedure. The Group filed a proof of claim and an objection to ISC's assumption of the Management Agreement. Second, the Group did not "refile" its claims in state court. The state court action, which ISC removed to this Court, asserted claims for breaches of the Management Agreement occurring or continuing after confirmation of ISC's bankruptcy plan. The claims asserted by the Group in the bankruptcy case dealt with claims arising on or before the date ISC filed for bankruptcy (pre-petition claims), as is evident by the Stipulation signed in that court that "no **prepetition** cure payments are due upon assumption." (Emphasis added.)

**C. Dr. Dwight Romriell**

The only fact in this portion of ISC's statement that has any relevance to ISC's motion for summary judgment is that as of January 1, 2004, Dr. Dwight Romriell was no longer an employee of the Group. The Group disputes that (1) Dr. Romriell was required to set up a practice outside the region; (2) Dr. Romriell secretly set up a new practice; and (3) Dr. Romriell began practicing at his new location on October 12, 2003 and spent the majority of his time between October 12 and December 31 at the new office. The Group further notes that ISC alleged to have paid Dr. Romriell's staff more than \$1,900 per week, but provided no admissible evidence in support of that claim or any evidence showing how much it billed and collected for Dr. Romriell's work during that time.

### **III. Argument**

#### **A. The Group's claims are not moot and should not be dismissed.**

ISC seeks the dismissal of the Group's first, second and third causes of action in its Complaint, alleging that such causes of action are now moot.

The Group's first cause of action is for declaratory judgment that (1) paragraph 5.2(b) of the Management Agreement is invalid and unenforceable, (2) the Group was authorized to enter into an employment agreement in August 2003 (the "2003 Employment Agreement") with Dr. Romriell and (3) ISC's failure to recognize the 2003 Employment Agreement constituted a material post-confirmation breach of the Management Agreement.<sup>3</sup> ISC declares in its Memorandum that it is not arguing the merits of whether paragraph 5.2(b) is valid and enforceable, yet then proceeds to make some arguments on the merits.

Consistent with ISC's style, it grossly exaggerates the Group's intent and attempts to deflect attention from its own culpability. The Group is not seeking "sweeping changes to the standard model in the United States of professional management of medical and dental offices..." Rather, the Group focuses on the inconsistencies between paragraph 5.2(b) and other provisions of the Management Agreement which would render paragraph 5.2(b) invalid. It also asserts that paragraph 5.2(b) violates public policy in Idaho because it allows individuals who are not licensed dentists to practice dentistry in Idaho by setting the terms of employment of a licensed dentists. ISC cannot use "business sense" or economic considerations as excuses for illegally practicing dentistry.

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<sup>3</sup> A copy of the 2003 Employment Agreement is attached as Exhibit C to the Affidavit of Dwight G. Romriell which is included as Exhibit 2 to Scott Kaplan's affidavit (Docket No. 65).

After a brief argument of the merits of the enforceability of paragraph 5.2(b), ISC states that there is no need to continue further because "there is currently no live controversy between the parties relating to the hiring of any dentist." However, there is a live controversy between the parties concerning the employment of a dentist by the Group.

Recently, Dr. Eric Johnson, who is an employee-dentist with the Group, announced his resignation. Initially, his resignation was effective March 15, 2004. Dr. Johnson then sought to extend the effective date to August 2004. The Group approved of the extension of the deadline on the basis that Dr. Johnson is the only orthodontist practicing with the Group and his continued employment was necessary to properly treat the Group's orthodontic patients. ISC rejected the extension of the deadline, forcing Dr. Johnson to adhere to the earlier date of resignation.<sup>4</sup> Again, ISC is making employment decisions which directly and adversely affect the Group's practice of dentistry. Group's attempt to provide emergency pediatric dental care through Dr. Larry Bybee has been severely squelched by ISC.<sup>5</sup> The Group's claim regarding paragraph 5.2(b) should not be dismissed.

The Group's cause of action for declaratory judgment also sought a declaration that the Group was authorized to enter into the 2003 Employment Agreement with Dr. Dwight Romriell. The 2003 Employment Agreement contains several obligations on the part of the Group to Dr. Romriell concerning his employment after October 12, 2003. For example, paragraph 2.1 states that Dr. Romriell's compensation is 38 percent of "Net Collections," which is defined in paragraph 2.2

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<sup>4</sup>See, Affidavit of G. Romriell in Opposition to Defendant's Motion for Summary Judgment, paragraph 3.

<sup>5</sup>See, Affidavit of G. Romriell, paragraph 4.

as the actual cash collected, however and *whenever* collected, resulting from professional services rendered after October 12, 2003. The agreement also makes it clear in paragraph 2.4 that Dr. Romriell was entitled to compensation for services performed prior to October 12, 2003 at the same rate of 38 percent and with the same qualification of "whenever collected."<sup>6</sup>

If the Group was authorized to enter into the 2003 Employment Agreement with Dr. Romriell, then it and ISC are obligated to continue paying Dr. Romriell based upon his net collections after his departure. Dr. Romriell received a check in February for accounts collected in January. However, without keeping this claim alive and conducting discovery there is no way to know whether ISC is paying Dr. Romriell the compensation he is entitled to under the agreement. Until discovery is completed and ISC has paid Dr. Romriell all sums to which he is entitled under the employment agreement, the Group's first cause of action is not moot.

The Group's second cause of action is for breach of contract. The Group alleges that ISC breached the 2003 Employment Agreement and/or the Management Agreement by threatening to exclude Dr. Dwight Romriell from the premises, terminating Dr. Romriell's staff, and failing to schedule and/or canceling appointments between Dr. Romriell and his patients. The Group obtained injunctive relief regarding these actions. While injunctive relief is no longer necessary, there is still a question concerning the Group's damages as a result of ISC's breaches. The breach of contract claim set forth in the Group's second cause of action is not moot and should not be dismissed.

The Group's third cause of action deals with injunctive relief. To the extent that Group can pursue a claim for damages as a result of ISC's actions involving Dr. Romriell under its second

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<sup>6</sup>See, Verified Complaint and Demand for Jury Trial, paragraphs 6 -15 (Docket No. 1).



cause of action, the Group would consent to the dismissal of its third cause of action on the condition that the bond deposited with the Court by the Group be exonerated. ISC should not be allowed to simultaneously argue that there are no pending issues related to injunctive relief and that the bond should remain in place.

**B. Approval of ISC's bankruptcy plan does not affect the Group's fourth cause of action.**

ISC argues that the claims in the Group's fourth cause of action are barred because of ISC's bankruptcy. The Group clearly stated in its fourth cause of action and prayer for relief that it was seeking damages for breaches of Management Agreement which occurred *after the effective date of ISC's bankruptcy plan*. While involving some of the same provisions of the Management Agreement, the breaches set out in Group's complaint are separate and distinct from those asserted by the Group to stop ISC's assumption of the Management Agreement in its bankruptcy case. Accordingly, the claims alleged in the Group's fourth cause of action are viable and subject to resolution by a jury in this lawsuit.

The authorities relied upon by ISC do not support its argument that the Group's claims are barred. Section 1141(a) of the Bankruptcy Code states in pertinent part that "the provisions of a confirmed plan bind the debtor . . . and any creditor." Section 1141(d)(1)(A) states that, except as otherwise proved in the plan or order confirming the plan, the confirmation of a plan discharges the debtor from any debt that arose **before the date of such confirmation. . .**" (Emphasis added.) Paragraph 12.1 of ISC's bankruptcy plan basically mirrors the provisions of Section 1141(d). Confirmation of the plan discharges claims that arose **before the confirmation date**. Neither the Bankruptcy Code nor the order confirming ISC's bankruptcy plan discharge any claims that arise

after confirmation of the plan. The confirmation of ISC's bankruptcy plan did not discharge its obligation to perform under the Management Agreement after confirmation. Group has alleged claims that ISC breached its obligations under the Management Agreement *after* confirmation of its plan.

The case of *In re Varat Enterprises, Inc.*, 81 F.3d 1310, 1316 (4th Cir. 1996), makes it clear that the *res judicata* effect of an order of confirmation applies only to claims that stem from the same cause of action at issue in the confirmation proceeding. "Generally, claims are part of the same cause of action when they arise out of the **same** transaction or series of transactions..." *Id.* (emphasis added). There, the plaintiff's claim was barred because it existed at the time of confirmation. *Id.* Claims which arise after confirmation obviously are incapable of being raised in a confirmation proceeding. Therefore, the principle stated in *In re Chattanooga Wholesale Antiques, Inc.*, 930 F.2d 458, 463 (6th Cir. 1991), that a confirmed plan bars relitigation of issues raised or that could have been raised in the confirmation proceedings, does not apply.

The principle that *res judicata* applies only to the same claim or demand raised, or which could have been raised, in the prior proceeding is stated in the cases of *Crown v. Klein Bros.*, 121 Idaho 942, 829 P.2d 532 (Ct.App. 1991) and *Diamond v. Farmers Group, Inc.*, 119 Idaho 146, 804 P.2d 319 (1990). In *Crown*, the Court stated:

In *Diamond*, the Court articulated a fact-based transactional approach for resolving the "same claim or demand" issue, stating:

"The 'sameness' of a cause of action for purposes of application of the doctrine of *res judicata* is determined by examining the operative facts underlying the two law suits. [Citations omitted.]

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*Diamond*, 119 Idaho at 149-150, 804 P.2d at 322-23. In order to further clarify the meaning of this “same transaction or series of transactions” test, the *Diamond* Court quoted the following analysis from Comment *a* to Section 24 of the Restatement of Judgments:

What factual grouping constitutes a “transaction” . . . [is] to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.

. . .

The present trend is to see claim [sic] in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff. . . .

*Diamond*, 119 Idaho at 150, 804 P.2d at 323 n.4.

*Crown*, 121 Idaho at 946-47. *Res judicata* applied in the *Crown* case because the **same** issue was litigated in the bankruptcy action involving the **same** series of transactions.

Debts that arise post-confirmation “are liabilities of the reorganized debtor and are not affected at all by the plan or the order confirming the plan.” *In re the Nuttall Equipment Co., Inc.*, 188 B.R. 732, 736 (Bankr.W.D.N.Y. 1995); *see also, In re Sure-Snap Corporation*, 983 F.2d 1015, 1018 (8th Cir. 1993)(confirmation of plan did not terminate the parties’ agreement; rather, confirmation prevented the collection of pre-confirmation debts); *Curtis Mfg. Co., Inc. v. Plasti-Clip Corp.*, 888 F.Supp 1212, 1218 (D.N.H. 1994)(pre-confirmation does not encompass a post-confirmation time frame). A claim does not arise until “the acts giving rise to the alleged liability are performed.” *In re Texaco, Inc.*, 218 B.R. 1, 7 (Bankr.S.D.N.Y. 1998). A debtor’s discharge does

not bar a claim which did not accrue and could not have been asserted pre-confirmation, even though it arose under the same contract as a pre-confirmation claim. *Id.* at 7-8.

The confirmation of ISC's bankruptcy plan did not alter the terms of the Management Agreement. In fact, by assuming that agreement, ISC agreed to be bound by its terms. ISC provided no authority, and can provide none, that confirmation of its plan relieved it of its future and continuing obligations under a contract it voluntarily agreed to assume. If ISC had no intention of abiding by the terms of the Management Agreement, it should have rejected it in the bankruptcy. When ISC assumed the Management Agreement, the Group rightfully assumed that ISC would change its conduct and begin complying with the terms of the agreement. However, ISC's post-confirmation conduct differed very little from its pre-petition conduct, evidencing an erroneous perception that the bankruptcy absolved it of performing its obligations under the agreement. As soon as the plan was confirmed, ISC continued to disregard and breach the terms of the Management Agreement. That conduct continues today.

The claims asserted in the Group's fourth cause of action arose post-confirmation. Each of those claims is briefly discussed below. Discovery is needed to develop many of those claims and the Group does not intend to prove the merits of those claims in this response. Rather, the discussion below is intended to demonstrate that the claims accrued post-confirmation and, therefore, are not barred by ISC's discharge or by the doctrine of *res judicata*.

**a. Failure to include in dentists' compensation the dentists' share of interest charged on patients' accounts.**

The Group asserts that the dentists are entitled under the Management Agreement and their employment agreements to their share of the interest that ISC charges and collects against patients' accounts. Since October 3, 2003, and continuing thereafter, ISC has collected such interest and

failed to pay the dentists their share of that interest. Without further discovery, the Group is unable to document the extent of this practice or the amount of interest collected.

**b. Failure to deposit accounts receivable in an account approved by the Group.**

This issue recently arose in the context of ISC seeking a temporary restraining order concerning the Group's mail. ISC essentially admitted that it was not following the requirements of the Management Agreement with respect to its banking arrangements. ISC took some action to correct this problem, but has subsequently used its California address as the address for the Group in violation of the parties' stipulation and the Court's order regarding the mail. From October 3, 2003 and continuing thereafter, ISC breached the Management Agreement in its handling of accounts receivable.

**c. Failure to pay the claims and obligations of the Group.**

Since October 3, 2003, the Group has incurred legal fees in prosecuting this action and defending the counterclaims of ISC. The Group has also incurred fees for mediation. ISC continues to refuse to pay these fees, which it is obligated to do under the Management Agreement.

**d. Interference with the Group's practice of dentistry.**

Since October 3, 2003, ISC has interfered with the Group's practice of dentistry by, among other things, not putting patients back on active recall status and continuing to put patients who are in a course of treatment on no-recall status. Further discovery is needed to determine the extent of this practice, but it has occurred post-confirmation. In addition, ISC has, since October 3, 2003, rejected the Group's efforts to extend the employment of Dr. Johnson and Dr. Bybee to provide its patients with continued orthodontic and pediatric dental care, respectively.<sup>7</sup>

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<sup>7</sup>See, Affidavit of G. Romriell, paragraphs 3 and 4.

**e. Failure to hire and train all non-dentist personnel necessary for the operation of the practice.**

Dentists at the Group currently lack sufficient numbers of trained staff. This situation existed on October 4, 2003 and continues to exist today. For example, Dr. Johnson, after giving sufficient notice of the need for an additional trained assistant, did not have one on October 4, 2003 and does not have one now. The lack of trained personnel was a critical factor in Dr. Johnson's decision to resign from the Group. In addition, Drs. Misner and Bybee have lacked sufficiently trained staff since October 3, 2003. Because of that, Drs. Misner and Bybee have not been able to treat as many patients and their production has significantly declined. Dr. Greg Romriell paid for certification classes at Idaho State University for two employees to become dental assistants because ISC refused to pay for this necessary training.<sup>7</sup>

**f. Charging paid time off, a benefit, to dentists as direct wages.**

Since October 3, 2003, and continuing thereafter, ISC has charged dentists for ISC personnel's paid time off, a benefit that ISC is obligated to pay out of its funds. Discovery is needed to determine the extent of this practice and the amounts improperly charged.

**g. Failure to maintain the Group's practice as the preeminent dental practice in the Pocatello and surrounding area, and h. Failure to provide and maintain equipment and supplies necessary for the efficient and effective operation of the practice.**

Mr. Wintersteen's report was prepared on October 14, 2003. It documents the state of disrepair and uncleanliness of the Pocatello facility. Since October 3, 2003, ISC has purchased no new technology nor made improvements to the facility. The equipment and facility remains in the state of disrepair described by Mr. Wintersteen. Just two weeks ago Dr. Greg Romriell, after

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<sup>7</sup>See, generally, Affidavit of G. Romriell, supra, paragraphs 6-9.  
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requests for an infrared cavity detector were repeatedly denied by ISC, was required to purchase that piece of equipment out of his own pocket for \$2,400. This failure is a breach of ISC's obligation to maintain the facility as the preeminent dental practice in the Pocatello area.

**i. Failure to provide an experienced manager.**

Since October 3, 2003, ISC has failed to provide the Group with a manager who has experience in dental practice management. Barbara Henderson has been hired in that position. Her background is that of a bookkeeper. She lacks relevant and necessary experience in dental practice management and human resources.

**j. Failure to provide financial statements and accounting records.**

Since October 3, 2003, ISC has not provided the Group with financial statements and accounting records and, in fact, have denied the Group's requests for records. The Group's collection rates have significantly dropped in the past two months. Discovery is needed to obtain the records to determine why the rates have dropped and to obtain financial information from ISC.

**k. Denial of access to patients' records.**

Since October 3, 2003, Drs. Dwight Romriell, Greg Romriell and L.R. Misner have requested patient lists, patient flow records and/or production information from ISC. ISC has refused to turn over those lists in violation of the Management Agreement.

**l. Violation of laws and public policy related to the practice of dentistry.**

The Group has legal, professional and ethical obligations to ensure that its patients have continuity of treatment and are not abandoned. Since October 3, 2003, Drs. Dwight Romriell and L.R. Misner have left the practice. Discovery is needed to determine what information ISC has

communicated to the Group's patients to ensure that the Group has satisfied its legal, ethical, and professional obligations to its patients.

There are genuine issues of material fact as to whether ISC breached the Management Agreement post-confirmation. Hence, ISC's motion for summary judgment should be denied.

ISC also argues that the Group is barred from asserting its claims in its fourth cause of action because of a stipulation signed by the Group in the bankruptcy case. According to the clear terms of the stipulation, the Group merely agreed that "no **prepetition** cure payments are due upon assumption." (Emphasis added.) Post-petition and post-confirmation breaches and claims were neither mentioned nor waived.

The Group is agreeable to ISC's "alternative" argument that recovery should be limited in scope to damages which accrued after October 3, 2003.

#### **IV. Conclusion**

With the possible exception of its claims for continued injunctive relief, the claims raised by the Group in its complaint are neither moot nor barred by ISC's bankruptcy. Therefore, ISC is not entitled to judgment as a matter of law and its motion for summary judgment should be denied.

DATED this 17 day of March, 2004.

COOPER & LARSEN, CHTD.  
Attorneys for Pocatello Dental Group, P.C.

  
\_\_\_\_\_  
RON KERL



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 17 day of March, 2004, I served a true and correct copy of the above and foregoing document to the following persons:

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